No. 87-854

Supreme Court, U.S.
FILED
NOV 24 1987
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JERRY COLANESE, *et al.*,

Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

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November 24, 1987

QUESTIONS PRESENTED FOR REVIEW

WHEN A UNION SUES A DISSENTING NONMEMBER TO COLLECT AN UNPAID REPRESENTATION FEE:

I. IS THE MEASURE OF DAMAGES REQUIRED BY THE FIRST AMENDMENT:

   A. A Pro Rata Share Of The Proven Costs Of Collective Bargaining; Or

   B. Arbitrarily Set Union Dues Less A Union-Determined Rebate Amount?

II. DOES THE FIRST AMENDMENT PERMIT A COURT TO ENTER JUDGMENT FOR AFFILIATION FEES IN A SUIT TO COLLECT THE REPRESENTATION FEE WHEN THE UNION HAS PRESENTED NO EVIDENCE OF ACTUAL EXPENDITURES FOR SERVICES PROVIDED TO THE DISSENTERS' BARGAINING UNIT BY THE STATE AND NATIONAL AFFILIATES?

LIST OF PARTIES

In addition to the parties named in the caption the following individuals are petitioners: Carol Colborne, Ronald Colborne, Christine Cortier, David Feikes, Dimitri Gloss, William Haselton, Rebecca Higgins, Michael Jennings, Donald Kane, Donald Kauffman, Janis Kiff, Patricia Lynch, William Lynch, Sandra Martz, David Mathews, Randall McCammack, Randall McGriff, David Millar, Brenda Moffitt, Timothy Moffitt, Jeffrey Neumann, Janet Wilson, Kathy Nova, Michael Powers, Ardeth Ross, Barbara Sandberg, Gail Schroeder, Daniel Shead, William Spier, Richard Sprague, Susan Stewart, Donald Thomas, Sandra Thomas, Yvonne Tofthagon, Harry Tolmen, Patricia Tolmen, Floyd Trosper, Deborah Varga, Theresa Wallace, David Washburn, and Kathryn Washburn.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

REFERENCE TO RULINGS

The decision of the Indiana Court of Appeals is not reported. It is reproduced in the Appendix at page 1a. The decision of the Superior Court is not reported and it is included in the Appendix at page 5a. The order of the Indiana Court of Appeals denying rehearing is not reported and is included in the Appendix at page 9a. The order of the Supreme Court of Indiana denying the petition to transfer the cause to that court is not reported. It is included in the Appendix at page 10a.

JURISDICTION

The judgment of the Indiana Court of Appeals is dated January 26, 1987. Appendix, page 1a. Petitioners' petition for rehearing was denied by that court on March

30, 1987. Appendix, page 9a. Their timely petition to transfer the cause to the Supreme Court of Indiana was denied by that court on August 26, 1987. Appendix, page 10a. This petition will be filed within 90 days of that date.

This Court has jurisdiction by virtue of 28 U.S.C. § 1257(3). Because the Supreme Court of Indiana denied the petitioners' motion to transfer the cause to that court, the Court of Appeals is the highest court of Indiana in which a decision could be had. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 216 (1977). Jurisdiction lies under 28 U.S.C. § 1257(3) "where any title, right, privilege or immunity is specially set up or claimed under the Constitution." As shown below, petitioners' defenses throughout the Indiana proceedings were based on their rights, privileges and immunities under the Constitution of the United States. Therefore, this Court has jurisdiction to review the judgment below by writ of certiorari. *See, e.g., New York Times Co. v. Sullivan*, 378 U.S. 540 (1964).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Respondent, New Prairie Classroom Teachers Association (NPCTA), is the exclusive bargaining agent for the teachers, including the petitioners, employed by the Board of School Trustees of the New Prairie United School Corporation (Corporation). Labor-management relations between NPCTA and the Corporation are governed by the terms of Indiana's Certified Educational Employees Bargaining Act (CEEBA), I.C. 20-7.5-1-1, *et seq*. NPCTA and the Corporation negotiated a collective bargaining agreement which went into effect on July 1, 1980. It remained in effect for school years 1981-82 and 1982-83.

Article IV, sub-paragraph 4.6, of the Agreement provides that all members of the bargaining unit who are not also members of the Association have an obligation to pay a representation fee to the Association for services rendered to all teachers. The Agreement also provides that no member of the bargaining unit will be forced to contribute financial support to political or ideological activities of the Association unrelated to collective bargaining, contract administration, and grievance adjustment or unrelated to its duties as exclusive bargaining representative.

The petitioners are not members of the NPCTA and they refused to pay any fee to it. Prior litigation with respect to the fees for 1980-81 resulted in a judgment for NPCTA for the exact amount claimed. *New Prairie Classroom Teachers Association v. Stewart*, 487 N.E.2d 1324 (Ind. App. 1986). This Court denied certiorari. *Stewart v. New Prairie Classroom Teachers Association*, ____ U.S. ____, 107 S. Ct. 1370 (1987).

The current case is a collection suit for representation fees for school years 1981-82 and 1982-83. The complaint was filed on August 17, 1983 and sought fees of $207.60 for 1981-82 and $225.80 for 1982-83. The petitioners duly answered. In their answer the petitioners denied liability and objected to the use of their fees for political and ideological purposes.

Trial was held before the court without a jury on July 31 and August 1, 1985. During the trial, in their post-trial briefs, and in their motion to correct errors to the Superior Court, the petitioners claimed that any judgment for an agency-shop fee in excess of $11.55 for 1981-82 and $19.09 for 1982-83 per individual was unconstitutional because it would be in excess of a pro rata share of the NPCTA's proven costs of representation. In this petition the teachers are attacking only the method by which the fee for NPCTA was calculated.

The record evidence with respect to the activities of NPCTA showed that its total expenditures for 1981-82, other than dues payments to affiliate organizations, divided by the number of people in the unit, were less than the dues-minus-rebate amount awarded by the trial court. Because the judgment is in excess of a pro rata share of the expenses, the constitutional violation resulting from the judgment below is evident. Appendix, page 7a.

NPCTA is affiliated with the Indiana State Teachers Association (ISTA), a statewide organization, and the National Education Association (NEA), a nationwide organization. Members of local affiliates must also be members of the state and national organizations. There-

fore, within Indiana, ISTA membership and NEA membership are the same. The fees claimed for ISTA and NEA were calculated in the same dues-less-rebate fashion as were the fees for NPCTA. During both years approximately 25% of the teachers represented by local organizations were not required to, and did not, pay fees to any level of the organization. Although these people were represented by and received the same services from ISTA and NEA as did the petitioners, their presence was ignored by the organizations in their calculations of the claimed fee. Rather than calculating the fee by dividing costs by the number of people receiving the services, the only proof offered was a dues-less-rebate calculation. When, as here, there is a significant variation between the number of people represented and the number of people required to pay the costs of such representation, a dues-less-rebate calculation always results in an excessive and therefore unconstitutional fee. The magnitude of the injury is related to the variance between the number represented and the number paying.

For example, in a true agency shop situation where *all* members and nonmembers are required to pay a fee and income equals expenses, a dues-less-rebate calculation and a pro rata share calculation will produce the same figure. In a case like this where 25% of the total are not required to pay, a constitutional pro rata share is related to dues-less-rebate in the following fashion. If "x" is a pro rata share and "y" is dues-less-rebate and there are 100 employees in the unit, only 75 of whom are required to pay fees, then

$$75\,y = 100\,x$$

$$y = \frac{100\,x}{75}$$

$$y = 1.33\,x$$

The dues-less-rebate calculation results in a fee that is excessive by 33%. The injury lessens as the number paying approaches the number represented but, as long as there is any disparity, there is injury in the constitutional sense.

The petitioners argued below that the proof was inadequate to justify any fee for ISTA and NEA because no attempt was made to show the cost of services rendered to, or on behalf of, NPCTA. The trial court awarded dues-less-rebate-based fees of $126.15 and $139.20 for ISTA and $38.40 and $42.93 for NEA. Appendix page 7a. Judgment was rendered on October 10, 1985.

As stated in the motion to correct errors filed in the Superior Court:

> The Court erred in finding that a representation fee may be based on dues *less* political, ideological, organizing and certain legal expenses. The proper measure of a representation fee is a pro rata share of the exclusive representative's costs of collective bargaining, contract administration and grievance adjustment and the performance of other statutory duties *vis-a-vis* the employer, not other government entities. If other organizations assist NPCTA to perform its statutory duties, the costs incurred may be recovered as a part of the fee but such costs are not measured by the dues paid to such organizations by members thereof. The recoverable amount is the amount actually spent in assisting the local representative in performing its duties. Amounts spent in assisting exclusive representatives other than NPCTA are not expenses recoverable from these defendants.

* * * *

In a suit-for-representation-fee case the measure of damages is not the amount of dues paid by a member; rather it is a pro rata share of the expenses incurred by the exclusive representative in performing its statutory duties. By finding that NPCTA is entitled to $19.86 as its portion of the representation fee for 1981-82 the Court ignored uncontradicted evidence that the maximum permissible pro rata fee based upon NPCTA's expenditures for the year is $18.27 per defendant.

* * * *

By finding that ISTA and NEA are entitled to fees of $126.15, $139.20 and $38.40, $42.93 respectively for the years in question the Court failed to require the plaintiff to prove the amount those organizations spent in assisting NPCTA in performing its statutory duties as the exclusive representative in the New Prairie schools. It is unlawful to charge the defendants with expenses incurred in lobbying any governmental agency other than the employer—here the Board of Trustees of the New Prairie School Corporation. The evidence in the record clearly shows that most of the activities of ISTA and NEA involve interaction with state and federal agencies other than the employer of the defendants. The costs of such activities are not chargeable to the defendants. See the attached opinion in *Beck v. Communications Workers of America*, ____ F.2d ____ (4th Cir. 1985) (No. 83-1955) (October 24, 1985).

* * * *

The Court's Conclusions of Law are erroneous in that any agreement which purports to authorize a representation fee in excess of a *pro rata* share of

> the plaintiff's costs necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of employees in dealing with the New Prairie School Corporation on labor-management issues is unconstitutional. The preponderance of the evidence in this record establishes that the NPCTA is not entitled to a fee in excess of $11.55 for 1981-82 and $19.09 for 1982-83 from each defendant.

In their arguments to the Superior Court the petitioners cited and relied on this Court's agency fee cases, including: *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Machinists v. Street*, 367 U.S. 740 (1960); and *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). They also cited and relied on the Seventh Circuit's decision in *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, _____ U.S. _____, 105 S. Ct. 2700. In terms of dollars the petitioners argue here that the maximum permissible fees are $18.27 and $19.09. The trial court entered a judgment against each individual in the amounts of $184.40 and $201.22. In their motion to correct errors the petitioners also cited and relied on the Fourth Circuit's decision in *Beck v. Communications Workers of America*, 766 F.2d 1187, (4th Cir. 1985) (No. 83-1955) (October 24, 1985). The motion was denied. The petitioners appealed.

In the Court of Appeals the petitioners made the same arguments and relied on the same cases as they had in the trial court. In addition they relied on this Court's then recent decision in *Chicago Teachers Union v. Hudson*, 475 U.S. _____, 106 S. Ct. 1066 (1986). The constitutional argument presented was phrased as follows:

> The judgment is unconstitutional because the amount exceeds a pro rata share of plaintiffs' costs necessarily or reasonably incurred for the purpose of performing the duties of the exclusive representative of the defendants in dealing with the New Prairie United School Corporation on labor-management issues.

The Court of Appeals rejected this argument, holding that "[t]he trial court's calculation of damages was proper." Appendix, page 2a. The Court of Appeals affirmed the judgment of the trial court on January 26, 1987.

The teachers' required petition for rehearing was filed in the Court of Appeals on or before February 25, 1987. The petition for rehearing was denied on March 30, 1987. Appendix, page 9a.

On April 16, 1987, petitioners filed a petition to transfer the cause to the Supreme Court of Indiana for review. In their supporting brief they made the same arguments that had been made in the Court of Appeals. In their brief they argued that *Hudson* and the other agency fee decisions of this Court required review and reversal of the decision. On August 14, 1987, the petitioners filed with the Indiana Supreme Court a copy of the Sixth Circuit's opinion in *Tierney v. City of Toledo*, 824 F.2d 1497 (1987). Nevertheless, the petition for transfer was denied on August 26, 1987. Appendix, page 10a. Thus, the Court of Appeals is the highest court of Indiana in which a decision could be had in this case and 28 U.S.C. § 1257(3) gives this Court jurisdiction to review that decision.

REASONS FOR ALLOWING THE WRIT

I. THE DECISION OF THE INDIANA COURT OF APPEALS IS IN CONFLICT WITH THE

APPLICABLE DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

A. *The Method Of Calculation.*

Abood, *Ellis* and *Hudson* mandate that an agency shop fee be based on the exclusive representative's costs of providing required services to the bargaining unit.

> The same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue. Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us.

Abood, 431 U.S. at 225-26. In *Abood* the Court went on to approve the concept of agency shops for public employees. In doing so, the Court pointed out that there will "be difficult problems in drawing lines between collective bargaining activities for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Id.* at 236. The Court also pointed out that the remedy must prevent "compulsory subsidization of ideological activity" while at the same time permitting the Union "to require every employee to contribute to the cost of collective bargaining activities." *Id.* at 237. It is *costs*, not dues, for which contributions can be compelled.

Ellis involved an agency shop for private sector employees, but the test of chargeability formulated there-

in is a constitutional one. 466 U.S. at 455. *Ellis* is a line-drawing case decided under the Railway Labor Act. There, the Court explained that the justification for union or agency shops is to eliminate the free-rider—the employee whom the union is required to represent but who has refused to contribute to the cost of such representation. With respect to such contributions the Court said:

> Hence, when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. at 448. Again, it is *costs*, not dues, for which contributions can be compelled.

Hudson concerned the procedural protections which must be in place before compelled contributions may be involuntarily deducted from a dissenting nonmember's salary. Nevertheless, it is precedent with regard to the questions presented here, because it requires that information with respect to expenditures be furnished to nonmembers, and disapproves of a fee calculated on a percentage of dues basis. Also, *Hudson* makes clear that

a fee may be compelled to collect for collective bargaining costs, not other expenses.

> Instead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee—the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers. An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.[18]

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18. We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." *Allen*, 373 U.S., at 122, 83 S.Ct., at 1163-1164, quoted in *Abood*, 431 U.S., at 239-240, n.40, 97 S.Ct., at 1801-1802 n.40. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations, see n.4, *supra*, for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

Id. at 1076.

The Indiana Court of Appeals was aware of *Hanson*, *Street*, *Allen*, *Abood*, *Ellis* and *Hudson* when it made its decision, yet it determined that the dues paid by a member was the proper measure of damages in this case. The disparity between the number of people represented and the number of people paying fees establishes the error in this conclusion. The First Amendment violation is clear, as is the failure of the Indiana Court of Appeals to properly interpret and apply *Abood*, *Ellis* and *Hudson*.

The Indiana Court of Appeals' reasoning flies in the face of this Court's statement in *Ellis* that the Court's comments about remedy in *Street* and *Allen* "did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies. Doing so now, we hold that the pure rebate approach is inadequate." *Ellis*, 466 U.S. at 443. The Court of Appeals' reasoning also is contrary to the holding in *Ellis*, 466 U.S. at 457 n.15 (emphasis added), "that the union bears the burden of what proportion of *expenditures* went to activities *that could be charged* to dissenters" by "the preponderance standard normally applicable in civil suits for damages."

Moreover, the result reached is inconsistent with *Hudson*, because the Indiana court accepted the union's dues-less-rebate approach. *Hudson* specifically rejected proof of that nature as satisfying the notice required for First Amendment procedural due process:

> An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total

> annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.

Hudson, 106 S. Ct. at 1076. The First Amendment requires that the union identify "the expenditures for collective bargaining and contract administration * * * for which nonmembers as well as members can fairly be charged a fee." *Id.* Surely a union that sues to collect a representation fee must show *no less* at trial before a court can enter a judgment depriving employees of their property. *See Hudson*, 106 S. Ct. at 1074 n.13; *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973); *Speiser v. Randall*, 357 U.S. 513, 524-25 (1958).

The reasoning of the Indiana Court of Appeals is also contrary to the elementary logic applied by the Massachusetts Labor Relations Commission in similar cases. *See, e.g., Dailey v. Woburn Teachers Association*, 13 MLC 1555 (1987). The Massachusetts Commission insists, and properly so, that to carry its burden of proof a union must not only prove the expenses of collective bargaining but also it must prove the number of people in the unit being served so that a proper pro rata share may be determined by dividing the one by the other. Dues, as such, have nothing to do with the calculation. The MLRC reasoned as follows:

> Here, we must consider whether the WTA has sustained its burden of establishing that the $141 agency fee it charged Dailey, minus the $10.71 "rebatable amount" that the WTA concedes was not chargeable to Dailey, was Dailey's proportional share of the permissible expenditures of the WTA and its affiliates. The WTA's position is that the agency fee

minus the "rebatable amount" for 1981-82 accurately reflects Dailey's pro rata share of permissible expenditures. WTA Exhibits 6 and 9 reveal, that, in 1981-82, the MTA and NEA calculated the "rebatable amounts" by adding all of the expenditures that the organizations themselves designated as impermissible, calculating what percent of total expenditures was impermissible, and applying that percentage to $141, the total amount of 1981-82 membership dues. The result was $6.29 of MTA expenditures, and $4.42 of NEA expenditures. The balance, according to the WTA, represents Dailey's pro rata share of the legitimate costs of collective bargaining.

Dailey raises a host of objections to this procedure. For the purposes of this motion, we need address only one, because it is dispositive. Dailey argues that, even if the WTA and its affiliates had accurately identified all of their impermissible expenditures, the WTA's method of calculating Dailey's share would nonetheless fail to comply with the constitutional mandate because there is no evidence of how members' dues are calculated and what relation they bear to total expenditures. "Applying a carefully calculated percentage to an arbitrary number does not provide any meaningful result." Dailey's Brief on Motion for Judgment at 7.

We agree with Dailey's position. Under Section 12 of the Law, public employees "may be forced to pay their proportional share of collective bargaining, contract administration, and grievance adjustment expenses." *School Committee of Greenfield*, 385 Mass. at 78. We hold, however, that the amount of the proportional share can be determined by: (1) adding up all of the amounts that a union has spent permissibly and dividing the total by the number of employees

> represented; or (2) evidence that the membership dues for a particular year represented the members' pro rata share of the anticipated union expenses for that year and that a particular proportion of those expenses were permissible. Thus, assuming, without deciding, that all of the WTA's expenditures in 1981-82 were permissible, the WTA could divide $87,046.40 (the amount of total expenditures shown in WTA Exhibit 1) by the number of employees in the WTA bargaining unit to determine the agency fee. Similarly, the MTA could divide its total permissible expenditures by the number of employees represented by the MTA to determine the portion of the agency fee payable to the MTA.

Dailey, at 1563-64 (footnotes omitted). As indicated above, the Massachusetts rule flows from *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982), which in turn follows this Court's opinion in *Abood*.

It is clear that the rule in Massachusetts conflicts with the rule in Indiana. It is also clear that the Indiana rule conflicts with the controlling decisions of this Court.

By limiting its consideration of injury solely to the post-collection use of fees, the Indiana Court of Appeals utterly failed to protect or provide for the other important pre-collection First Amendment rights as outlined by this Court in *Hudson*.

B. *The Evidence Is Inadequate To Show That ISTA And NEA Are Entitled To Any Fee.*

If other organizations assist NPCTA to perform its statutory duties, the costs incurred may be recovered as a part of the fee but such costs are not measured by the

dues paid to such organizations by members thereof. The recoverable amount is the amount actually spent in assisting the local representative in performing its duties. Amounts spent in assisting exclusive representatives other than NPCTA are not expenses recoverable from these teachers.

The information provided at trial on behalf of ISTA and NEA is precisely of the same type determined by this Court to be inadequate in *Hudson*, 106 S. Ct. at 1076:

> Instead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee—the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers.

The result reached by the Indiana courts thus is squarely in conflict with the result reached by the Sixth Circuit in *Tierney v. City of Toledo*, *supra*. As stated in *Tierney*, the required ". . . disclosure must include an audited, detailed accounting of local union payments to affiliated state and national labor organizations that will be used for agreement and non-agreement related purposes." *Id.*, 824 F.2d at 1503; *see Hudson*, 106 S. Ct. at 1076 n.18. Necessarily, at least the same quality of information must be supplied to satisfy the union's burden of proof at trial in a collection suit.

In this connection it must be remembered that it is the employees' First Amendment rights that are involved. Any state-authorized encroachment upon those rights

must be narrowly drawn so as to be the least restrictive alternative accomplishing the governmental purpose involved. That purpose is met by requiring payment for the Union's performance of its statutory duties "in dealing with the employer on labor-management issues." *Ellis*, 466 U.S. at 448.

By finding that ISTA and NEA are entitled to fees based on their membership dues-less-rebate determination, the Indiana Court of Appeals failed to require the plaintiff to prove the amount those organizations spent in assisting NPCTA in performing its statutory duties as the exclusive representative in the New Prairie schools. The teachers contend that the vast majority of NEA's and ISTA's activities, political or otherwise, are not "related to collective bargaining" with the Corporation as this Court understood that concept in *Abood*. The plurality opinion in *Abood* held that, although collective bargaining in public-sector employment is itself a "political" activity, a state statute could require dissenting employees (such as the teachers here) to associate with an exclusive representative (such as NPCTA) for the purpose of bargaining.

And it went on to hold that certain other "political" activities "might be seen as an integral part of the bargaining process." 431 U.S. at 227-32, 236 (opinion of Stewart, J.).

The definition of "collective bargaining" used in *Abood*, though, was quite precise. The Michigan statute at issue itself defined "collective bargaining" as

> the performance of the mutual obligation of the employer and the representative of the employees to

> meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement if requested by either party.

Mich. Comp. Laws § 423.215. And the *Abood* plurality reflected just such an understanding of collective bargaining—but no more. For example, the plurality referred to "[t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances"; by way of examples, it spoke of "the union's policy in negotiating a medical benefits plan," "a union policy of negotiating limits on the right to strike," "the union's wage policy," and "the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination"; it wrote of "expenditures" and "service charges * * * applied to collective bargaining, contract administration, and grievance-adjustment purposes"; and it distinguished from "collective-bargaining activities" those "social activities" that "fall outside the Union's duties as exclusive representative." 431 U.S. at 221, 225-26, 232, 236 n.33. Recognizing that successful "negotiating [of] a final agreement" might require "the approval of a higher executive authority or a legislative body," the plurality added that "subsequent approval [of a written collective-bargaining agreement] by other public authorities" and "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Id.* at 228, 236. Overall, then, the *Abood* plurality held that "collective bargaining" means:(i) negotiating an agreement with the public employer; (ii) where necessary,

seeking the "approval of a higher executive or legislative body" to ratify or implement the agreement; and (iii) administering the agreement—in short, performing the statutory duties of the exclusive representative.

Moreover, *Abood* makes clear that, with respect to a particular organization acting as an exclusive representative of particular public employees, "collective bargaining" refers only to those activities that the representative performs, pursuant to the applicable statute, *within the bargaining unit to which the employees belong*. The policy reasons that arguably justify compelling dissenting public employees to associate with a private organization as their exclusive representative rationally apply only to the unit in which those employees function—for only there does the representative have "great responsibilities" *relative to those employees*; only there may the representative's task "entail expenditures of much time and money," or even any time and money, ostensibly *on behalf of those employees*; only there will *those employees* possibly have "the incentive * * * to become 'free riders'"; only there is the representative "under a duty of fair representation" *to those employees*; only there will "confusion and conflict" *as to those employees' terms and conditions of employment* arguably be mitigated by collective negotiations; and only there will "labor peace" among those employees be served (if at all) by collective bargaining. *Id.* at 221, 222, 224; *see Hammons v. Adams*, 783 F.2d 597, 604-05 (5th Cir. 1986); *Sine v. Local 992, IBT*, 730 F.2d 964, 966 (4th Cir. 1984).

Or, in sum, "collective bargaining" under *Abood* means negotiation and administration of an agreement concerning terms and conditions of employment for

employees in the bargaining unit under consideration, and (where applicable) "political" activity that is "an integral part of the bargaining process" because it is necessary to ratify or implement the negotiated agreement. "Collective bargaining" for employees in unit *A*, then, does *not* include *any* activity the organization designated as their exclusive representative performs for employees in some separate units *B*, *C*, or *D*—even if that organization or one of its affiliates is also the representative in those units. Rather, with respect to the employees in unit *A*, the activities of the representative in units *B*, *C*, or *D* constitute "political activities '*unrelated* to collective bargaining'" because: (i) that other activity is "political," by definition; and (ii) it is not a part "of the bargaining process" in the relevant bargaining unit. The holdings of this Court in *Abood*, *Ellis* and *Hudson* compel these conclusions.

Thus, in *Ellis* the Court approved litigation costs for "disputes arising in the bargaining unit," "fair representation litigation arising within the unit," "any other litigation . . . that concerns bargaining unit employees and is normally conducted by the exclusive representative," but excluded "the expenses of litigation not having such a connection with the bargaining unit." 466 U.S. at 453. Moreover, the general standard for chargeable costs adopted in *Ellis* limits them to activities directly tied to the union's performance of its statutory duties as "exclusive representative of the employees in *dealing with the employer* on labor-management issues" and "as exclusive representative of the employees *in the bargaining unit*." *Id.* at 448 (emphasis added). And in *Hudson* this Court was concerned with the amounts paid by the exclusive representative to its state and national affiliates. *Hudson*, 106 S. Ct. at 1076 n.18.

By failing to require proof of the amount spent by ISTA and NEA in support of the exclusive representative, the Indiana Court of Appeals failed to follow the applicable decisions of this Court.

C. *The Issues Raised In This Case Are Of Nationwide Importance.*

As the Court well knows from its review of other cases, *e.g.*, *Abernathy v. San Jose Teachers Ass'n*, 475 U.S. _____, 106 S. Ct. 1372 (1986); *Tierney v. City of Toledo*, 475 U.S. _____, 106 S. Ct. 1628 (1986), suits for service fees are quite common. In Indiana the only way in which a union can enforce collection of a fee from a dissenter is by a civil action for damages. *See*, *Alexander v. Anderson Federation of Teachers*, 416 N.E.2d 1327 (Ind. App. 1981) (agreement making payment of an agency fee a condition of employment is illegal under Indiana law).

However, as shown by the result below, the Indiana courts are refusing to follow and apply not only the decisions of the other states and lower federal courts but also the clear precedents of this Court as well. While this Court's opinions are cited, the results reached are clearly inconsistent therewith. Petitioners submit that the current rule in Indiana is clearly unconstitutional. But, unless the current rule is changed by this Court, Indiana will remain a pocket where the delicate First Amendment rights of its teachers continue to be abused by short-sighted and insensitive jurists who have embarked on a course not guided by applicable precedents of this Court. In Indiana alone, the First Amendment rights of over 11,200 teachers are abridged until this Court reviews the judgment below and clearly enforces the already articulated proper rule

that an agency fee must be based on a pro rata share of an exclusive representative's proven costs of collective bargaining on behalf of the dissenting employees' bargaining unit.

CONCLUSION

For the foregoing reasons the Court should grant this petition and set the case down for plenary briefing and argument.

Respectfully submitted,

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November 24, 1987

APPENDICES

APPENDIX A

DECISION OF THE COURT OF APPEALS OF INDIANA THIRD DISTRICT

January 26, 1987

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

JERRY COLANESE, ET AL.,	)	
Appellants	)	
(Defendants Below)	)	
v.	)	No. 46A03-8603-CV-72
NEW PRAIRIE CLASSROOM	)	FILED:
TEACHERS ASSOCIATION,	)	JANUARY 26, 1987
Appellee	)	
(Plaintiff Below)	)	

APPEAL FROM THE LAPORTE SUPERIOR COURT
ROOM ONE
HONORABLE DONALD D. MARTIN, JUDGE
CAUSE NO. 42843

MEMORANDUM DECISION

HOFFMAN, J.

Defendants-appellants Jerry Colanese, et al., appeal from a judgment in favor of plaintiff-appellee New Prairie Classroom Teachers Association.

New Prairie Classroom Teachers Association (hereinafter NPCTA) was, by the terms of a collective bargaining agreement with the Board of School Trustees of the New Prairie United School Corporation, the exclusive bargaining agent for the teacher of that corporation, including the appellants (hereinafter "Teachers"), for the period of July 1, 1980 through June 30, 1983. The terms of the collective bargaining agreement provided that all members of the bargaining unit who were not also members of NPCTA had an obligation to pay a representation fee to NPCTA for services rendered to all

teachers. The Teachers were not members of NPCTA and refused to pay any fee. NPCTA filed a complaint for damages on August 17, 1983 asking for the Teachers' representation fees for the school years 1981-82 and 1982-83. The Teachers answered the complaint and filed a counterclaim against NPCTA for future relief. The trial court entered judgment for plaintiff NPCTA against the defendant Teachers and ordered the Teachers to each pay the sum of $181.41 for school year 1981-82 and $201.22 for school year 1982-83.

The Teachers present two issues, as restated, for review:

(1) whether the trial court erred in its calculation of the representation fee due NPCTA; and

(2) whether the trial court erred in denying appellants' counterclaim and their request for injunctive relief.

Both of these issues have been decided contrary to Teachers in *Abels v. Monroe County Educ. Ass'n* (1986), Ind.App., 489 N.E.2d 533, 538, *reh. denied* and *New Prairie Classroom Teachers v. Stewart* (1986), Ind.App., 487 N.E.2d 1324, 1328, *trans. denied.* Those decisions thus control the outcome of the Teachers' allegation of error. The trial court's calculation of damages was proper.

The Teachers' second allegation of error challenges the following Findings of Fact by the trial court:

> 7. The Court further finds [that] defendants have failed to prove the allegations of their counterclaim and the same is accordingly denied.
>
> 8. The Court further finds that injunctive relief is inappropriate and the same is accordingly denied."

A trial court's finding of fact will not be disturbed on appeal unless it is unsupported by the evidence, and this Court will not weigh the evidence but will view only that evidence most favorable to the appellee. *Kozuch v. CraMar Video Center, Inc.* (1985), Ind. App., 478 N.E.2d 110, 113.

The Teachers' counterclaim asked for damages, pursuant to 42 U.S.C. § 1983, for alleged constitutional violations by NPCTA. The Teachers rely on the United States Supreme Court's decision in *Abood v. Detroit Bd. of Education* (1977), 431 U.S. 209, 235, 97 S.Ct. 1782, 1800, in which the Court recognized that the First Amendment of the United States Constitution prevents a union from using part of required representation fees to contribute to political candidates and/or to express political views unrelated to its duties as exclusive bargaining representative.

The Teachers' counterclaim was properly denied. No constitutionally impermissible use of service fees could have possibly occurred because no such fees have been collected to date. Also, the calculation of the as yet uncollected service/representation fees by the trial court was consistent with the method approved by this Court (see *Abels*, *supra*, and *Stewart*, *supra*) and suggested by the United States Supreme Court in *International Ass'n. of Machinists v. Street* (1961) 367 U.S. 740, 774-775, 81 S.Ct. 1784, 1802-1803. This approved method was specifically intended to prevent the constitutionally impermissible use of service/representation fees.

The trial court was also justified in finding that the injunctive relief prayed for by the Teachers was inappropriate. In their counterclaim and answer, the Teachers asked

> "that the Court issue an injunction barring Plaintiff, now and in the future, from instituting judicial

> action to collect any service fee from Defendants which Plaintiff knows does not accurately reflect a nonmember's pro rata share of the costs of collective bargaining, contract administration and grievance handling[.]"

No injunctive relief was warranted because plaintiff NPCTA did and does have the right to file claims for an amount of representation fees that is consistent with the method of calculation approved by this Court in *Abels*, *supra*, and *Stewart*, *supra*. Also, the allegations contained in the Teachers' counterclaim of inequitable conduct and bad faith on the part of NPCTA in initiating this action were totally unsupported by the record. No evidence of such conduct was presented at trial.

The decision of the trial court is affirmed.

GARRARD, P.J., and STATON, J., CONCUR.

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE LA PORTE SUPERIOR COURT NO. 1

October 10, 1985

STATE OF INDIANA	)	LAPORTE SUPERIOR
	) SS:	COURT NO. 1
COUNTY OF LAPORTE	)	1985 TERM

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION, Plaintiff,	)	
vs.	)	CAUSE NO. 42843
JERRY COLANESE, et al., Defendants.	)	

This case came before the Court for trial on July 31, 1985 and August 1, 1985. Plaintiff appeared by counsel, Richard J. Darko, Janet C. Knapp and Patrick E. Donoghue. Defendants appeared by counsel, David T. Bryant and Arthur L. Roule, Jr. Witnesses were sworn and evidence heard. At the conclusion of the trial, the Court took the matter under advisement pending submission by the parties of written briefs and proposed findings and conclusions. The parties have submitted the same and the Court now issues its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Indiana Court of Appeals held in *New Prairie Classroom Teachers Association v. Stewart*, 460 N.E.2d 149 (Ind. App. 1983) that:

> "The agency shop agreement between NPCTA and the School Board as to payment of representation fees to NPCTA was authorized by law, constitutional, and binding upon non-member teachers."

2. The collective bargaining clause which was the subject of the Court of Appeals decision in *Stewart*, *supra*, is the same clause under which NPCTA seeks to collect a representation fee in this case.

3. NPCTA is the exclusive representative of the certified school employees in the New Prairie United School Corporation. NPCTA was elected exclusive representative in its affiliated status with Indiana State Teachers Association (ISTA) and National Education Association (NEA). A teacher may not join the NPCTA without also joining ISTA and NEA.

4. Defendants in this suit, non-members of NPCTA who are also members of the bargaining unit represented by NPCTA, are liable for a fair share representation fee for school years 1981-82 and 1982-83. The proper amount of the representation fee includes all costs related to collective bargaining, contract administration, grievance adjustment and the performance of the duties of an exclusive bargaining representative. The representation fee shall not include any expenses for political and ideological activities unrelated to the duties of the exclusive bargaining representative, the cost of organizing non-members and certain legal expenses not properly charged to non-members.

5. The scope of the fair share representation fee encompasses numerous statutory duties with their attendant responsibilities and activities. NPCTA's affiliation with ISTA and NEA provides necessary and vital resources without which NPCTA could not meet its legal obligations without charging exorbitant fees to both members and non-members.

6. By a preponderance of the evidence, Plaintiff has established it is entitled to recover of each of the Defendants in this suit the following:

a. For school year 1981-82, NPCTA is entitled to collect a representation fee in the amount of $184.41 per defendant. This amount includes $19.86 for NPCTA, $126.15 for ISTA, and $38.40 for NEA.

b. For school year 1982-83, NPCTA is entitled to collect $201.22 per defendant. This amount includes $19.09 for NPCTA, $139.20 for ISTA, and $42.93 for NEA.

7. The Court further finds defendants have failed to prove the allegations of their counter-claim and the same is accordingly denied.

8. The Court further finds that injunctive relief is inappropriate and the same is accordingly denied.

CONCLUSIONS OF LAW

1. The law is with Plaintiff and against the Defendants.

2. The representation fee provision between NPCTA and the New Prairie United School Corporation contained in their collective bargaining agreement is a constitutional, enforceable obligation by which the Plaintiff may collect a fair share representation fee from non-members of its bargaining unit.

3. By a preponderance of the evidence the Plaintiff has established the amount of the fair share representation fee for school year 1981-82 assessable against each Defendant to be the sum of $184.41.

4. By a preponderance of the evidence, Plaintiff has established the amount of the fair share representation fee for school year 1982-83 assessable against each Defendant to be in the sum of $201.22.

IT IS THEREFORE ORDERED, ADJUDGED & DECREED, that the Plaintiff have and recover of each of the Defendants in this suit the sum of $184.41 for school year 1981-82 and the sum of $201.22 for school year 1982-83 plus all costs of this action.

Dated this 10th
day of October, 1985.

/s/ Donald D. Martin

DONALD D. MARTIN, Judge
LaPorte Superior Court No. 1

APPENDIX C

NOTICE OF THE COURT OF APPEALS OF INDIANA DENYING PETITION FOR REHEARING

March 30, 1987

STATE OF INDIANA

CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 317-232-1930

DAVID T. BRYANT
SUITE 600
8001 BRADDOCK ROAD
SPRINGFIELD, VA 22160-0000

Cause Number
46A03-8603-CV-00072
LOWER CAUSE
42843

JERRY COLANESE, ET AL VS NEW PRAIRIE CLASSROOM TEACHERS

You are hereby notified that the COURT OF APPEALS has on this day 3/30/87 APPELLANT'S PETITION FOR REHEARING DENIED. WESLEY W. RATLIFF, JR., CHIEF JUDGE.
APPELLEE'S PETITION TO PUBLISH DECISION DENIED. WESLEY W. RATLIFF, JR., CHIEF JUDGE.

WITNESS my name and the seal of said
Court, this 30TH day of MARCH, 1987

/s/ Dan Heiser
Clerk Supreme Court, Court of
Appeals and Tax Court

APPENDIX D

NOTICE OF THE SUPREME COURT OF INDIANA DENYING PETITION FOR TRANSFER

August 26, 1987

STATE OF INDIANA

CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 317-232-1930

DAVID T. BRYANT
SUITE 600
8001 BRADDOCK ROAD
SPRINGFIELD, VA 22160-0000

Cause Number
46A03-8603-CV-00072
LOWER CAUSE
42843

JERRY COLANESE, ET AL VS NEW PRAIRIE CLASSROOM TEACHERS

You are hereby notified that the SUPREME COURT has on this day 8/26/87 APPELLANT'S "PETITION FOR TRANSFER" IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE.
ALL JUSTICES CONCUR.

WITNESS my name and the seal of said
Court, this 26TH day of AUGUST, 1987

/s/ Dan Heiser
Clerk Supreme Court, Court of
Appeals and Tax Court